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No. 04-173

In the Supreme Court of the United States

RICHARD A. QUINN, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in calculating the amount of disgorgement in a civil enforcement action brought by the Securities and Exchange Commission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Graham v. *SEC*, 222 F.3d 994 (D.C. Cir. 2000)	6
SEC v. *Bilzerian*, 29 F.3d 689 (D.C. Cir. 1994)	4
SEC v. *Blatt*, 583 F.2d 1325 (5th Cir. 1978)	4
SEC v. *First Jersey Secs.*, 101 F.3d 1450 (2d Cir. 1996), cert. denied, 522 U.S. 812 (1997)	6
SEC v. *First Pac. Bancorp.*, 142 F.3d 1186 (9th Cir. 1998), cert. denied, 525 U.S. 1121 (1999)	5
SEC v. *Patel*, 61 F.3d 137 (2d Cir. 1995)	4
SEC v. *Thomas James Assocs.*, 738 F. Supp. 88 (W.D.N.Y. 1990)	5
Wickham Contracting Co. v. *Local Union No. 3*, 955 F.2d 831 (2d Cir.), cert. denied, 506 U.S. 946 (1992)	6

Statutes, regulation and rule:

Securities Act of 1933, § 17(a), 15 U.S.C. 77q(a)	3
Securities Exchange Act of 1934, § 10(b), 15 U.S.C. 78j(b)	3
17 C.F.R. 240.10b-5	3
Sup. Ct. R. 14.1(a)	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not published in the *Federal Reporter* but is available at 88 Fed. Appx. 744. The January 28, 2003 opinion of the district court (Pet. App. 8a-17a) is not published in the *Federal Supplement* but is available at 2003 WL 223392. The June 3, 2002 order of the district court (Pet. App. 18a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 18, 2004. A petition for rehearing was denied on May 3, 2004 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on August 2, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. United Energy Partners (United Energy) was a Texas corporation engaged in the business of drilling oil and gas wells. Petitioner Richard A. Quinn was the president and chief executive officer of United Energy and a 90% shareholder. Petitioner Scott W. Tucker was the executive vice president and owned the other 10% of the company's stock. United Energy formed joint ventures that offered undivided working interests in oil and gas wells. Between June 1995 and January 1998, petitioners raised approximately $7.5 million from at least 285 investors through the sale of those interests. Pet. App. 19a-20a.

The offering memoranda for the joint ventures represented that the total amount raised from investors would be spent on drilling, testing, completing, and equipping the wells. In fact, however, only half of the funds received from investors was earmarked for drilling expenses. The other half was used to pay sales commissions, to cover United Energy's operating expenses, and to purchase "lead lists" from marketing companies. Investor funds were also used to pay Quinn's rent, utility bills, and credit-card bills; to lease a Cadillac for Quinn and a Lexus for his girlfriend; and to pay for vacations for Quinn, Tucker, and others. Pet. App. 23a-24a.

2. In January 1998, the Securities and Exchange Commission (Commission) brought a civil law-enforcement action against Quinn, Tucker, and United Energy, alleging violations of the anti-fraud provisions of the securities laws. After appointing a special master to operate United Energy (Pet. App. 3a, 12a-13a), the district court entered partial summary judgment for the Commission on its claims against Quinn and Tucker

(*id.* at 18a-30a). On the basis of undisputed facts (*id.* at 19a-25a, 26a), the district court found (*id.* at 26a) that Quinn and Tucker made misrepresentations in connection with the sale of securities and thereby violated Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. The court enjoined Quinn and Tucker from further violations of the anti-fraud provisions of the securities laws and ordered them, jointly and severally, to disgorge $7.5 million, together with pre-judgment interest. Pet. App. 26a-30a. In a subsequent order, the district court determined the pre-judgment interest rate and imposed a civil penalty on Quinn and Tucker of $110,000 each. *Id.* at 8a-17a.

3. In an unpublished per curiam opinion, the court of appeals affirmed. Pet. App. 1a-7a. The court held that the district court did not err in entering summary judgment (*id.* at 3a-4a) and did not abuse its discretion in granting injunctive relief (*id.* at 4a), ordering disgorgement (*id.* at 4a-5a), ordering the payment of pre-judgment interest (*id.* at 6a), or imposing a civil penalty (*id.* at 6a-7a). With respect to disgorgement, the court of appeals held that "[t]he $7.5 million raised is a reasonable estimate of the profits received by fraud." *Id.* at 5a. It rejected petitioners' contentions that the disgorgement order should have been based "on the much smaller amount they received through their employment with United Energy" and that the district court should have "offset against the disgorgement order the amounts spent on legitimate business expenses." *Id.* at 4a.

ARGUMENT

1. Petitioners contend (Pet. 4-10) that the district court abused its discretion in calculating the amount of disgorgement. The court of appeals correctly held otherwise, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

Petitioners contend that the district court miscalculated the amount of disgorgement because the $7.5 million they were ordered to pay "represents the entirety of the *proceeds* obtained by United Energy, not the *profits* [p]etitioners received from their involvement with United Energy." Pet. 4. Petitioners argue that their "profits" were limited to the approximately $800,000 they assertedly received "from their employment with United Energy." *Ibid.* In the alternative, they argue that the $7.5 million should have been offset by the approximately $3.75 million that was assertedly "devoted to drilling expenses" (Pet. 8) and thus constitutes "legitimate business expenses" (Pet. 7).

Petitioners are mistaken. As the very cases they cite (Pet. 5) recognize, the meaning of "profits," in the context of a fraudulent sale of securities, is the difference between the amount received from the investors and the true value of the securities provided in return. See *SEC* v. *Patel*, 61 F.3d 137, 139-140 (2d Cir. 1995); *SEC* v. *Bilzerian*, 29 F.3d 689, 696-697 (D.C. Cir. 1994); *SEC* v. *Blatt*, 583 F.2d 1325, 1327-1328, 1335 n.30 (5th Cir. 1978). Because petitioners offered no evidence of the value of the securities they sold (see SEC C.A. Br. 23), the district court permissibly found that the profits for which they were jointly and severally liable were equivalent to the proceeds, and the court of appeals correctly held that "[t]he $7.5 million raised is a

reasonable estimate of the profits received by fraud" (Pet. App. 5a). Contrary to petitioners' contention (Pet. 5-6), the court of appeals' decision does not conflict with decisions recognizing courts' authority to order disgorgement of profits, because that is the principle the court of appeals applied.

Nor is there a circuit conflict on the question whether the amount of disgorgement must be offset by "legitimate business expenses." Pet. 7. The only decisions cited by petitioners that address that issue (Pet. 7-8) are decisions of district courts. The cases on which petitioners rely, moreover, hold only that the amount of disgorgement *may* be offset by business expenses, not that it must be. See, *e.g.*, *SEC* v. *Thomas James Assocs.*, 738 F. Supp. 88, 95 (W.D.N.Y. 1990).*

2. Petitioners also contend (Pet. 10-11) that the district court abused its discretion in ordering them to pay pre-judgment interest. The question presented in the certiorari petition (Pet. i) concerns disgorgement, however, and the question whether pre-judgment interest was permissibly awarded is not "fairly included therein." Sup. Ct. R. 14.1(a). In any event, petitioner's challenge to the award of pre-judgment interest is without merit and does not warrant review by this Court.

Petitioners first argue that the purpose of awarding pre-judgment interest is to prevent a defendant from

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* Petitioners do not challenge in this Court the principle of joint and several liability applied by the district court in requiring them to disgorge the total amount of funds raised by the three violators (Quinn, Tucker, and United Energy). As the court of appeals recognized (Pet. App. 5a), that principle is firmly established in Commission enforcement actions. See, *e.g.*, *SEC* v. *First Pac. Bancorp*, 142 F.3d 1186, 1191-1192 (9th Cir. 1998) (citing cases), cert. denied, 525 U.S. 1121 (1999).

having the benefit of an interest-free loan in the amount of his ill-gotten gains, and that, because they "gave up everything of value they owned to the Special Master," they did not receive an interest-free loan. Pet. 10. That is incorrect. The funds of which the special master took control did not include the entire amount of petitioners' ill-gotten gains. Moreover, petitioners were ordered to pay the full amount of pre-judgment interest only for the period before the special master was appointed. See Pet. App. 11a-13a. For the period after the appointment, the district court cut the interest rate in half. *Ibid.*

Petitioners also argue that a district court may not award pre-judgment interest before considering "the need to fully compensate the wronged party for actual damages suffered," and that, because the Commission is not a victim, there is no need to "fully compensate the Commission." Pet. 10-11 (quoting *SEC* v. *First Jersey Secs.*, 101 F.3d 1450, 1476 (2d Cir. 1996), cert. denied, 522 U.S. 812 (1997)). That theory is equally misconceived. The need for compensation is one of four factors that were originally set forth in a case involving private parties. See *Wickham Contracting Co.* v. *Local Union No. 3*, 955 F.2d 831, 833-834 (2d Cir.), cert. denied, 506 U.S. 946 (1992). Since injury and damages need not be proved in a civil enforcement action brought by the Commission, see, *e.g.*, *Graham* v. *SEC*, 222 F.3d 994, 1001 n.15 (D.C. Cir. 2000), the factor has no relevance here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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